

STATE OF NEW YORK

8155--B

Cal. No. 586

2017-2018 Regular Sessions

IN ASSEMBLY

May 31, 2017

Introduced by M. of A. MORELLE, WEINSTEIN, DenDEKKER, VANEL -- read once and referred to the Committee on Judiciary -- reported and referred to the Committee on Ways and Means -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee -- ordered to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

AN ACT to amend the civil rights law, in relation to the right of privacy and the right of publicity; and to amend the civil practice law and rules, in relation to the timeliness of commencement of an action for violation of the right of publicity

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 50 of the civil rights law is renumbered section
2 50-f and a new section 50 is added to read as follows:

3 § 50. Definitions. For the purposes of sections fifty-f, fifty-g,
4 fifty-h, fifty-i and fifty-one of this article, the following terms
5 shall have the following meanings:

6 1. "Deceased individual" means any individual, including his or her
7 persona, who has died.

8 2. "Digital replica" means a computer-generated or electronic reproduc-
9 tion of a living or deceased individual's likeness or voice that real-
10 istically depicts the likeness or voice of the individual being
11 portrayed. A digital replica is included within an individual's
12 portrait.

13 3. "Secretary" means the secretary of state.

14 4. "Fund-raising" means an organized activity to solicit donations of
15 money or other goods or services from persons or entities by an organ-
16 ization, company or public entity.

17 5. "Individual" means a natural person, living or dead.

18 6. "Name" means the actual or assumed name, or nickname, of a living
19 or deceased individual that identifies that individual.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets
[-] is old law to be omitted.

LBD11384-08-8

7. "Person" means any natural person, firm, association, partnership, corporation, company, syndicate, receiver, common law trust, conservator, statutory trust, or any other entity by whatever name known or however organized, formed or created, and includes not-for-profit corporations, associations, educational and religious institutions, political parties, and community, civic or other organizations.

8. "Persona" means, individually or collectively, the name, portrait or picture, voice, or signature of an individual.

9. "Right of privacy" means a personal right, which protects against the unauthorized use of a living individual's name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent, extinguished upon death.

10. "Right of publicity" means an independent property right, derived from and independent of the right of privacy, which protects the unauthorized use of a living or deceased individual's name, portrait or picture, voice, or signature for advertising purposes or purposes of trade without written consent.

11. "Signature" means a handwritten or otherwise legally binding form of an individual's name, written or authorized by that individual, which distinguishes the individual from all other individuals.

§ 2. Section 50-f of the civil rights law, as renumbered by section one of this act, is amended to read as follows:

§ 50-f. Right of privacy and right of publicity. ~~[A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.]~~ 1. For the purposes of the right of privacy, a living individual's persona shall not be used for advertising purposes or purposes of trade without obtaining the written consent of such person, or if a minor of his or her parent or guardian.

2. For the purposes of the right of publicity, a living or deceased individual's persona is personal property, freely transferable or descendible, in whole or in part by contract or by means of any trust or testamentary instrument, whether such contract, trust or testamentary instrument was entered into or executed before or after the effective date of this subdivision. Such right of publicity shall not be used for advertising purposes or the purposes of trade without obtaining the written consent of the individual, his or her successors or assigns as provided for in the provisions of this article pertaining to the right of publicity. In the case of a minor, written consent must first be obtained of his or her parent or guardian for the purposes of an exclusive or non-exclusive license as limited by section 35.03 of the arts and cultural affairs law. A parent or guardian is prohibited from assigning a minor's right of publicity, and such assignments shall be unenforceable. Nothing in this section shall limit any other rights such minor may have.

§ 3. The civil rights law is amended by adding three new sections 50-g, 50-h and 50-i to read as follows:

§ 50-g. Duration of an individual's right of publicity. Every individual's right of publicity shall continue to exist for forty years after his or her death, and does not expire upon the death of the individual.

§ 50-h. Methods of transfer and conveyance. 1. The rights recognized under the provisions of this article pertaining to the right of publicity are freely transferable and descendible, in whole or in part, by the following:

1 (a) contract;

2 (b) license;

3 (c) gift;

4 (d) trust;

5 (e) testamentary document. The rights shall vest in the persons enti-
6 tled to the right of publicity under the testamentary instrument of the
7 deceased individual effective as of the date of that individual's death.
8 In the absence of an express transfer in a testamentary instrument of
9 the deceased individual's right of publicity, a provision in the testa-
10 mentary instrument that provides for the disposition of the residue of
11 the deceased individual's assets shall be effective to transfer the
12 rights recognized under this article in accordance with the terms of
13 that provision; and

14 (f) intestate succession. The right to publicity of an individual
15 dying intestate shall be distributed under the laws of intestate
16 succession, and the rights and remedies of this article may be exercised
17 and enforced by a person or persons who possess at least a fifty-one
18 percent interest of the individual's right of publicity. Such persons
19 shall make a proportional accounting to, and shall act at all times in
20 good faith with respect to, any other person in whom the rights being
21 enforced have vested.

22 2. The rights established by the provisions of this article pertaining
23 to the right of publicity shall also be freely transferable or descendi-
24 ble by any subsequent owner of the deceased individual's right to
25 publicity as recognized by this article. Nothing in the provisions of
26 this article pertaining to the right of publicity shall be construed to
27 render invalid or unenforceable any contract entered into by a deceased
28 individual during his or her lifetime by which the deceased individual
29 assigned the rights, in whole or in part, to use his or her right of
30 publicity as defined in this article.

31 3. If any deceased individual does not transfer his or her rights
32 under this section by contract, license, gift, trust or testamentary
33 document, and there are no surviving persons as described in paragraph
34 (f) of subdivision one of this section, then the property rights associ-
35 ated with the deceased individual's right of publicity shall terminate.

36 4. Any person claiming to be a successor in interest to the right of
37 publicity of a deceased individual under this article or a licensee of a
38 deceased individual's right of publicity shall register that claim with
39 the secretary on a form prescribed by the secretary and upon payment of
40 a fee of one hundred dollars. The form shall include the name and date
41 of death of the deceased individual, the name and address of the claim-
42 ant, the basis of the claim, and a sworn affidavit under penalty of
43 perjury as to the rights claimed. Claims registered under this registry
44 and information regarding such successors in interest to the deceased
45 individual's right of publicity shall be public records.

46 5. Upon receipt and after filing of any document pursuant to this
47 section, the secretary shall post the document along with the entire
48 registry of persons claiming to be successors in interest to the
49 deceased individual's right of publicity or a registered licensee under
50 this section upon an internet website developed by the secretary for
51 such purpose. The secretary may reproduce by digital or other means any
52 of the filings or documents and destroy the original filing or document.

53 6. The secretary is authorized to promulgate such regulations as he or
54 she shall deem necessary to implement the provisions of subdivisions
55 four and five of this section.

7. No action shall be brought under the provisions of this article pertaining to the right of publicity by reason of any use of a deceased individual's right of publicity occurring after the expiration of the duration of the right of publicity as provided in section fifty-g of this article. Furthermore, no action may be brought under the provisions of this article pertaining to the right of publicity for a violation of a deceased individual's right of publicity unless the claim is registered. However, an action may be brought under the provisions of this article pertaining to the right of publicity for a violation of a deceased individual's right of publicity:

(a) for any violation that occurs prior to registration provided the claim is registered within six months following the individual's death; or

(b) for any subsequent publication, manufacturing, distribution, or sale or use in violation of a deceased individual's right of publicity once a claim has been registered.

8. If there is a right of publicity registration for a deceased individual, any person seeking to license the right of publicity for the individual shall have the right to rely upon such registration and posting and thereby presume that the person who has registered and posted his or her claim on the secretary's public internet website has the right to assign or license the deceased individual's right of publicity. The registration and posting of a person's claim to a deceased individual's right of publicity on the secretary's public internet website shall constitute a defense to an action brought under the provisions of this article pertaining to the right of publicity.

9. Any person who knowingly makes a false or fraudulent representation in connection with a registration with the secretary to establish a claim to a deceased individual's right of publicity pursuant to this section shall be liable for any damages sustained as a result of the false or fraudulent registration as determined by a court of competent jurisdiction.

10. Any document filed with the secretary, whether such document is a reproduction or an original, may be destroyed by the secretary forty-seven years after the death of the individual whose right of publicity has been registered therein. The secretary shall remove any document registered and posted upon the public internet website upon showing of a court order from a court of competent jurisdiction that a person claiming to be a successor in interest to a deceased individual's right of publicity has wrongfully registered such claim.

§ 50-i. No abrogation of rights and remedies. Nothing contained in the provisions of this article shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal or state law.

§ 4. Section 51 of the civil rights law, as amended by chapter 674 of the laws of 1995, is amended to read as follows:

§ 51. Action for injunction and for damages. 1. Applicability. The provisions of this article related to the right or privacy and the right of publicity apply to an act or event that occurs within New York.

2. Right of publicity exceptions. For purposes of the right of publicity, consent for use of another individual's persona shall not be required, except as otherwise provided in subdivisions three and four of this section, when used in connection with the following:

(a) news, public affairs or sports broadcast, including the promotion of and advertising for a public affairs or sports broadcast, an account of public interest or a political campaign;

1 **(b) in:**

2 **(i) a play, book, magazine, newspaper, musical composition, visual**
3 **work, work of art, audiovisual work, radio or television program if it**
4 **is fictional or nonfictional entertainment, or a dramatic, literary or**
5 **musical work;**

6 **(ii) a work of political, public interest or newsworthy value includ-**
7 **ing a comment, criticism, parody, satire or a transformative creation of**
8 **a work of authorship; or**

9 **(iii) an advertisement or commercial announcement for any of the works**
10 **described in paragraph (a) of this subdivision or this paragraph; or**

11 **(c) fundraising purposes by not-for-profit radio and television**
12 **stations licensed by the federal communications commission of the United**
13 **States, or by not-for-profit advocacy organizations if the use is for**
14 **commentary or criticism;**

15 **(d) use of the right of publicity of a deceased individual where the**
16 **licensee or successor in interest has failed to register and post a**
17 **claim of right under section fifty-h of this article, with the exception**
18 **of the safe harbor period listed in subdivision seven of section fifty-h**
19 **of this article, until such time as a claim of right has been registered**
20 **and posted as required under such section.**

21 **(e) Nothing in this section relating to the right of publicity shall**
22 **be deemed to abrogate or otherwise limit other rights or exceptions**
23 **otherwise conferred by state and federal case law interpretations as to**
24 **the applicability of sections fifty and fifty-one of this article made**
25 **prior to the effective date of the chapter of the laws of two thousand**
26 **eighteen which amended this section.**

27 **3. Digital replica for purposes of trade in an expressive work. (a)**
28 **Use of a digital replica, as defined in subdivision two of section fifty**
29 **of this article, of an individual shall constitute a violation if done**
30 **without the consent of the individual if the use is:**

31 **(i) in a scripted audiovisual or audio work, or in a live performance**
32 **of a dramatic work, in a manner that is intended to create, and that**
33 **does create, the clear impression that the individual represented by the**
34 **digital replica is performing, the activity for which he or she is**
35 **known, in the role of a fictional character; or**

36 **(ii) in a performance of a musical work, in a manner that is intended**
37 **to create, and that does create, the clear impression that the individ-**
38 **ual represented by the digital replica is performing, the activity for**
39 **which he or she is known, in such musical work; or**

40 **(iii) in an audiovisual work, in a manner that is intended to create,**
41 **and that does create, the clear impression that the athlete represented**
42 **by the digital replica is engaging in an athletic activity for which he**
43 **or she is known.**

44 **(b) Consent for the use of the digital replica of an individual as**
45 **provided in the provisions of this article shall not be required if such**
46 **use is:**

47 **(i) for purposes of parody, satire, commentary, or criticism;**

48 **(ii) in a work of political, public interest, or newsworthy value, or**
49 **similar work, including a documentary, regardless of the degree of**
50 **fictionalization in the work; or**

51 **(iii) de minimis or incidental.**

52 **4. Digital replica use in a pornographic work. Use of a digital**
53 **replica of an individual shall constitute a violation if done without**
54 **the consent of the individual if the use is in an audiovisual porno-**
55 **graphic work in a manner that is intended to create and that does create**
56 **the impression that the individual represented by the digital replica is**

1 performing. Nothing in this section shall limit any other rights the
2 individual may have against any party relating to such pornographic
3 work.

4 5. Limited immunity. The owners or employees of any medium used for
5 advertising including, but not limited to, newspapers, magazines, radio
6 and television networks and stations, cable television systems, bill-
7 boards, and transit advertising, who make unauthorized use of an indi-
8 vidual's persona for the purpose of advertising or trade shall not be
9 liable for such use under the provisions of this article unless it is
10 established that such owner or employee had knowledge of the unauthor-
11 ized use, through presence or inclusion, of the individual's persona in
12 such advertisement or publication.

13 6. Action for injunction and for damages. Any person whose [name,
14 portrait, picture or voice] persona is used within this state for adver-
15 tising purposes [ex], for the purposes of trade without the written
16 consent first obtained as [above] provided [may] in the provisions of
17 this article is entitled to maintain an equitable action in the supreme
18 court of this state against the person[, firm or corporation] so using
19 his [name, portrait, picture or voice] or her persona, to prevent and
20 restrain the use thereof; and may also sue and recover damages for any
21 injuries sustained including an amount equal to the greater of seven
22 hundred fifty dollars or compensatory damages by reason of such use and
23 if the defendant shall have knowingly used such person's [name,
24 portrait, picture or voice] persona in such manner as is forbidden or
25 declared to be unlawful by [section fifty] the provisions of this arti-
26 cle relating to the right of privacy or the right of publicity, the
27 [jury] finder of fact, in its discretion, may award exemplary damages.
28 [But nothing] A violation of an individual's right of privacy or right
29 of publicity may occur without regard to whether the use or activity is
30 for profit or not-for-profit.

31 7. No defense. It shall not constitute a defense to an action for
32 violation of an individual's right of privacy or right of publicity that
33 such violation includes more than one individual.

34 8. Use and transfer. Nothing contained in this article shall be so
35 construed as to prevent any [person, firm or corporation] individual or
36 person from selling or otherwise transferring any material containing
37 such [name, portrait, picture or voice] persona in whatever medium to
38 any user of such [name, portrait, picture or voice] persona, or to any
39 third party for sale or transfer directly or indirectly to such a user,
40 for use in a manner lawful under this article[, nothing].

41 9. Photographers. Nothing contained in this article shall be so
42 construed as to prevent any person[, firm or corporation,] practicing
43 the profession of photography, from exhibiting [in or about his or its
44 establishment] or displaying, including in a gallery or on an online
45 portfolio specimens of the work of such [establishment, unless the same
46 is continued by such person, firm or corporation after written notice
47 objecting thereto has been given by the person portrayed, and nothing]
48 photographer, or from making specimens of the work available for licens-
49 ing purposes in so far as the licensed use does not violate this arti-
50 cle. A photographer shall not be liable if the use of the photograph was
51 not authorized by the photographer.

52 10. Manufacturers, writers, composers and artists. Nothing contained
53 in this article shall be so construed as to prevent any person[, firm or
54 corporation] from using the [name, portrait, picture or voice of] perso-
55 na owned by any manufacturer or dealer in connection with the goods,
56 wares and merchandise manufactured, produced or dealt in by [him] the

1 manufacturer which [~~he~~] has been sold or disposed of with such [~~name,~~
2 ~~portrait, picture or voice~~] persona used in connection therewith; or
3 from using the [~~name, portrait, picture or voice~~] persona of any author,
4 composer or artist in connection with his or her literary, musical or
5 artistic productions which he or she has sold or disposed of with such
6 [~~name, portrait, picture or voice~~] persona used in connection therewith.

7 11. Copyright owners of a sound recording. Nothing contained in this
8 section shall be construed to prohibit the copyright owner of a sound
9 recording from disposing of, dealing in, licensing or selling that sound
10 recording to any party, if the right to dispose of, deal in, license or
11 sell such sound recording has been conferred by contract or other writ-
12 ten document by such living person or the holder of such right. [~~Nothing~~
13 ~~contained in the foregoing sentence shall be deemed to abrogate or~~
14 ~~otherwise limit any rights or remedies otherwise conferred by federal~~
15 ~~law or state law.~~]

16 12. Termination of post mortem right of publicity. Nothing in the
17 provisions of this article pertaining to the right of publicity shall be
18 construed as prohibiting the use of the deceased individual's right of
19 publicity that occurs after the expiration of forty years following his
20 or her death. Nor shall anything in the provisions of this article
21 pertaining to the right of publicity be construed as creating liability
22 or giving rise to any remedy for any actions or conduct involving the
23 use of a deceased individual's right of publicity that occurred prior to
24 the effective date of the chapter of the laws of two thousand eighteen
25 which amended this section.

26 13. Statute of limitations. Actions brought under the provisions of
27 this article pertaining to the right of publicity shall be commenced
28 within one year of the date of discovery of the injury to the plaintiff
29 or from the date through the exercise of due diligence such injury
30 should have been discovered by the plaintiff, whichever is earlier.

31 § 5. The section heading and subdivision 3 of section 215 of the civil
32 practice law and rules are amended to read as follows:

33 Actions to be commenced within one year: against sheriff, coroner or
34 constable; for escape of prisoner; for assault, battery, false imprison-
35 ment, malicious prosecution, libel or slander; for violation of right of
36 privacy or the right of publicity; for penalty given to informer; on
37 arbitration award.

38 3. an action to recover damages for assault, battery, false imprison-
39 ment, malicious prosecution, libel, slander, false words causing special
40 damages, or a violation of the right of privacy or the right of public-
41 ity under [~~section fifty-one~~] article five of the civil rights law;

42 § 6. Severability clause. If any clause, sentence, paragraph, subdivi-
43 sion, section or part of this act shall be adjudged by any court of
44 competent jurisdiction to be invalid, such judgment shall not affect,
45 impair, or invalidate the remainder thereof, but shall be confined in
46 its operation to the clause, sentence, paragraph, subdivision, section
47 or part thereof directly involved in the controversy in which such judg-
48 ment shall have been rendered. It is hereby declared to be the intent of
49 the legislature that this act would have been enacted even if such
50 invalid provisions had not been included herein.

51 § 7. This act shall take effect on the one hundred eightieth day after
52 it shall have become a law, and shall apply to all living individuals
53 and deceased individuals who died on or after such date.